No. 80-935

In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL BANK OF JACKSON, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court had abused its discretion in dismissing the EEOC's complaint with prejudice for failure to comply with petitioner's improper discovery requests.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 5-6

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 6

Economou v. *United States Department of Agriculture*, 535 F. 2d 688 3

EEOC v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981) 6

Frederick v. *United States*, 386 F. 2d 481 ..... 4, 5

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 6

Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355 5

Oppenheimer Fund, Inc. v. *Sanders*, 437 U.S. 340 6

Oyler v. *Boles*, 368 U.S. 448 5

Peterson v. *Weinberger*, 508 F. 2d 45, cert denied, 423 U.S. 830 3-4

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Page

Cases—Continued:

Rothensies v. *Electric Storage Battery Co.*, 329 U.S. 296 ..... 4, 5

United States v. *Angel*, 347 F. Supp. 830 4

United States v. *Edens*, 372 F. Supp. 1317 4

United States v. *Shaw*, 309 U.S. 495 5

United States v. *State Bank*, 96 U.S. 30 5

Statutes and rules:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 1

Section 706(b), 42 U.S.C. 2000e-5(b) 6

Section 706(k), 42 U.S.C. 2000e-5(k) 6

Section 709(e), 42 U.S.C. 2000e-8(e) 6

Federal Tort Claims Act:

28 U.S.C. 1346 2

28 U.S.C. 2674 *et seq.* 2

28 U.S.C. 2680(h) 2, 3

Fed. R. Civ. P. 26(b)(1) 6

Fed. R. Civ. P. 37 2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 614 F. 2d 1004. The district court's opinion and judgment (Pet. App. 9a-14a) are not officially reported. They are unofficially reported at 22 Fair Empl. Prac. Cas. 694.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1980. A petition for rehearing was denied on September 12, 1980 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on December 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission filed this suit in the United States District Court for the Southern District of Mississippi, alleging that petitioner had discriminated against blacks in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* After investigating the charge of discrimination filed by George Brister, the Commission concluded that there was reasonable cause to believe that petitioner had discriminated against blacks as a group but not against Brister. Following unsuccessful attempts to rectify petitioner's unlawful employment practices without resort to litigation, the Commission filed its complaint in this case.

In its answer petitioner asserted an affirmative defense (Pet. App. 21a-23a) and an identical counterclaim (Pet. App. 23a), alleging that the Commission suit was maliciously brought, in conspiracy with Mr. Brister, for the purpose of "defrauding, harassing and vexing" petitioner (Pet. App. 18a-19a, 21a-23a).[1] The cited jurisdictional bases

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[1]More specifically, the answer and counterclaim stated that Mr. Brister was a "persistent filer of charges" whom the Commission "assisted and encouraged * * * in the formulation and execution of a

for the counterclaim were the Federal Tort Claims Act, 28 U.S.C. 1346 and 2674 *et seq.*, and the court's "ancillary * * * jurisdiction * * * over the action * * *" (Pet. App. 23a).

In connection with the counterclaim and affirmative defense, petitioner sought discovery of information from 45 different Commission investigative files relating to charges brought by Brister against other employers (Pet. App. 10a). Because the Commission failed to comply with the discovery requests, the district court dismissed the Commission's suit with prejudice under Fed. R. Civ. P. 37 and awarded petitioner costs and attorneys' fees. The court held that the Federal Tort Claims Act constituted a waiver of sovereign immunity and that petitioner's counterclaim was "actually [a claim for] recoupment[]" and as such was "compulsory under the Federal Rules of Civil Procedure" (Pet. App. 11a-12a).

The court of appeals reversed, holding that the dismissal constituted an abuse of discretion because, as a matter of law, petitioner could not maintain the counterclaim or the affirmative defense (Pet. App. 6a). Noting that it was undisputed that the counterclaim alleged malicious prosecution, the court found such a claim against the government expressly barred by the Federal Tort Claims Act, 28 U.S.C. 2680(h) (Pet. App. 4a). The court of appeals also held that the counterclaim did not assert a matter in recoupment

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plan to defraud, vex and harass the defendant * * *." Petitioner further alleged that the Commission "maliciously and for ulterior motives" continued processing Mr. Brister's charge after discovery of its "true nature" and, in conspiracy with Mr. Brister, "brought this suit * * * where there was no probable cause * * *" (Pet. App. 22a-23a). As relief, petitioner sought compensatory damages and an order enjoining the Commission from taking any action on charges filed by Mr. Brister (Pet. App. 24a).

because the connection between the counterclaim and the Commission's suit was "tenuous and indirect" and because recovery for malicious prosecution depends on a finding that a plaintiff had no valid claim and, therefore, there could be no monetary award that could be recouped (Pet. App. 5a-6a). The court concluded that petitioner's claim of malicious prosecution and harassment was insufficient, as a matter of law, to constitute an affirmative defense to the alleged Title VII violations because it did not relate to the primary issue of whether petitioner had unlawfully discriminated against blacks (Pet. App. 6a).

ARGUMENT

The decision below warrants no further review; it is based on established principles of law and is fully consistent with the decisions of this Court and the courts of appeals.

1. Applying the plain language of Section 2680(h) of the Federal Tort Claims Act, the court of appeals correctly held that while the Act waives immunity as to certain types of tort claims against the United States, it expressly excepts claims, such as petitioner's counterclaim, based on assertions of malicious prosecution. Section 2680(h) states, in pertinent part, that:

> The [waiver] provisions * * * shall not apply to—
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *.

Accordingly, numerous courts have held that counterclaims for malicious prosecution or abuse of process, like that asserted here, are not authorized by the Federal Tort

Claims Act. See *Economou* v. *United States Department of Agriculture*, 535 F. 2d 688, 690 (2d Cir. 1976); *Peterson* v. *Weinberger*, 508 F. 2d 45, 50 (5th Cir.), cert. denied, 423 U.S. 830 (1975); *United States* v. *Edens*, 372 F. Supp. 1317 (D.S.C. 1974); *United States* v. *Angel*, 347 F. Supp. 830, 832 (E.D. Pa. 1972).

2. The court of appeals also properly held that petitioner's counterclaim will not support a recovery in recoupment. This Court has clearly defined the standard for maintaining a claim in recoupment:

> "[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded." It has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects.

Rothensies v. *Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) (citation omitted). See also *Frederick* v. *United States*, 386 F. 2d 481, 488 (5th Cir. 1967). The court of appeals correctly applied this standard in finding that the connection between the counterclaim and the Commission suit was "too tenuous and indirect to warrant the innovation [*sic*] of the doctrine of recoupment" (Pet. App. 5a). Petitioner's alleged discriminatory employment practices constitute the transaction upon which the Commission suit is based while the counterclaim deals, not with petitioner's employment practices, but with allegations of conspiracy and malice in the administrative process.[2]

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[2]The court of appeals' decision does not conflict with any of the Fifth Circuit decisions cited by petitioner (Pet. 9). Those decisions simply involved application of the accepted legal standard, the same standard applied by the court of appeals here, to the particular circumstances of those cases. In any event, the asserted intra-circuit conflict would not warrant review by this Court.

Further, the doctrine of recoupment provides relief in the form of a set-off, reduction, or abatement of the monetary liability imposed on a defendant. See *Rothensies* v. *Electric Storage Battery Co., supra,* 329 U.S. at 299-300; *United States* v. *Shaw,* 309 U.S. 495, 504 (1940); *Frederick* v. *United States, supra,* 386 F. 2d at 488. As the court of appeals recognized, no set-off is possible here. If the EEOC prevails, its suit cannot be considered malicious or vexatious in nature and the counterclaim must fail. If, on the other hand, the allegations of petitioner's counterclaim are true, and this suit is vexatious and lacking in merit, there will be no recovery against which an award for petitioner could be set-off. Thus, what petitioner seeks is not recoupment, but rather an independent judgment for damages (see Pet. App. 24a) which may not be obtained absent a waiver of sovereign immunity.[3]

3. The court of appeals' holding that petitioner's claim was insufficient, as a matter of law, to constitute an affirmative defense is correct. Petitioner cannot avoid liability for violating the law by challenging the government's motives for bringing suit, where no claim of unconstitutional prosecution is established. See, *e.g., Oyler* v. *Boles,* 368 U.S. 448 (1962). To allow petitioner's defense to defeat this action would undermine Title VII's overriding purpose of eliminating discrimination. Cf. *Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355, 368 (1977);[4] *Albemarle Paper Co.* v.

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[3] *United States* v. *State Bank*, 96 U.S. 30 (1877), on which petitioner relies, involved a plaintiff's right to sue the government for repayment of money fraudulently obtained by the government. Recoupment was not at issue.

[4] Contrary to petitioner's assertion (Pet. 5), the court of appeals' holding is not in conflict with *Occidental Life Insurance Co.* v. *EEOC, supra.* There, the Court observed that if a defendant's ability to make a defense is prejudiced by the Commission's inordinate delay in bringing

Moody, 422 U.S. 405, 421 (1975). The remedy for bad faith or vexatious prosecution by the Commission is that expressly provided by Congress in Title VII: payment of costs and attorneys' fees. Section 706(k), 42 U.S.C. 2000e-5(k). See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978).

Since the information sought was irrelevant to any issue in this case and not "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1), the court of appeals correctly held that dismissal of this suit for failure to comply with petitioner's discovery requests was an abuse of discretion. See *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 352 (1978).[5]

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suit, the trial court may diminish back pay relief. Petitioner does not claim any such prejudice in defending the charges in this case.

[5]Furthermore, even if the information sought had been within the scope of Fed. R. Civ. P. 26(b)(1), the district court's dismissal of the complaint in this case would have been an abuse of discretion. Ignoring the Commission's substantial compliance with petitioner's discovery requests as well as the Commission's objections to certain of the requests on the ground that disclosure of the information sought was prohibited under Sections 706(b) and 709(e), 42 U.S.C. 2000e-5 and 2000e-8(e), the district court asserted that there was "no valid reason" (Pet. App. 10a) for the Commission's failure to allow petitioner "access to [its] files * * * containing approximately 45 charges of discrimination lodged by a chronic complainer named George Brister" (*ibid.*). The Commission furnished petitioner with the complete administrative file in this case. This Court's decision in *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 12-13, makes it plain that petitioner is not generally entitled to access to the Commission's files in cases as to which it is a "stranger." Without determining whether petitioner was entitled to the information in the 45 other files notwithstanding the prohibitions of Sections 706(b) and 709(e), the district court could not properly exercise its discretion. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), therefore, provides no support for petitioner's position in this case. In *National Hockey Club, Inc.*, the information sought was relevant to the issues in the case and the court considered all of the relevant considerations in deciding to dismiss the complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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